Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dennis Theriot; Ann Rodriguez; Ronald Perrin; Norman A. Ronquille; David J. Dowell; Iris C. Isenmann; Herman J. Carbo; Maplewood Civic Association, Inc.

Petitioners,

v.

Parish of Jefferson, State of Louisiana; T. J. Ward, also known as Butch; Donald Jones; et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX I

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED AUG 17 1999

No. 97-30729

DENNIS THERIOT; ANN RODRIGUEZ; RONALD PERRIN; NORMAN A. RONQUILLE; DAVID J. DOWELL; IRIS C. ISENMANN; HERMAN J. CARBO; MAPLEWOOD CIVIC ASSOCIATION, INC.,

Plaintiffs-Appellants,

versus

PARISH OF JEFFERSON, State of Louisiana; T. J. WARD, also known as Butch; DONALD JONES; EDMOND MUNIZ; NICK GIAMBELLUCA, in his official capacity as member of the Parish Council, Parish of Jefferson, State of Louisiana; TIM COULON, in his official capacity as President of Jefferson Parish; AARON BROUSSARD, in his official capacity as Chairman of the Jefferson Parish Council; LLYOD F. GIARDINA; JOHN LAVARINE, in his official capacity as member of the Jefferson Parish Council;

Defendants-Appellees,

UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE,

Intervenor Defendants-Appellees,

THE COUNCIL OF THE CITY OF KENNER; TERRY McCARTHY; BETTY BONURA; MARC JOHNSON; JEANNIE BLACK; JOHN LAVARINE, III; MICHELE BRANIGAN; PHIL CAPITANO,

Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before DAVIS, STEWART, and PARKER, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this appeal, we must decide whether appellants were entitled to prevail at the bench trial on their claim that the Third Councilmanic District of the Parish of Jefferson is unconstitutional because it results from a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of 42 U. S. C. § 1983.

I

A

The Parish of Jefferson ("Jefferson Parish" or the "Parish") is a political subdivision of the State of Louisiana. Pursuant to the Jefferson Parish Home Rule Charter ("Home Rule Charter"), Jefferson Parish is governed by a Parish President and a council that is comprised of seven members. The Jefferson Parish Council (the "Council") is authorized to manage and to operate the Parish government. Jefferson Parish utilizes a majority vote requirement in its councilmanic elections under the terms of its Home Rule Charter.

Since January 1986,[1] several cases pertaining to the constitutionality of Jefferson Parish's councilmanic districts

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[1]According to the 1980 United States Census, blacks in Jefferson Parish comprised 13.86% of the total population, and 11.78% of the voting age population. Jefferson Parish had a total population of 454,592 persons and a black population of 63,001. The voting age population included 314,323 persons, of whom 268,878 were white and 37,039 were black. There were197,376 registered voters in the Parish of whom 23,381 were black.

have been filed in federal court.[2] In the first case, *Floyd v. Parish of Jefferson*, No. 86-0265 (E.D. La. June 22, 1987), certain Jefferson Parish registered voters filed suit alleging that the structure of the Jefferson Parish councilmanic districts violated the constitutional requirement of one-person, one-vote.[3] The *Floyd* lawsuit terminated with a consent judgment that ordered the Parish to "more evenly distribute the population of the [Parish] among its four councilmanic districts" to ensure compliance with the requisite one-person, one vote principle. The Jefferson Parish Council amended Section 2.02 of the Home Rule Charter to reapportion the population distributions among councilmanic districts. This amendment, embodied in Ordinance No. 16932, was incorporated into the consent judgment and resulted in no district's having a black population in excess of 24%. Overall, the consent decree did not alter the 4-2-1 election scheme.[4] It only required that the Parish reapportion the four single member districts to bring it into compliance with one-person, one-vote principles.

Subsequently, in *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 691 F.Supp. 991 (E.D. La. 1988), voting rights organizations and

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[2] Pursuant to 1957 revisions to the Jefferson Parish Home Rule Charter, a seven-member Council functions as the legislative and policy-making body of the Parish. The Parish President acts as the chief administrative officer. For purposes of representation, initially the Parish was divided into four council districts, each of which elected a single council member. Two "super-districts," one consisting of Districts 1 and 2 and a second consisting of Districts 3 and 4, each elected an additional council member. The seventh council member was elected from the Parish at-large. This plan was commonly referred to as the "4-2-1 plan."

[3] See Reynolds v. Sims, 377 U.S. 533 (1964) (establishing one-person, one-vote principle).

[4] See *supra* note 2.

individual registered voters brought an action against the Parish alleging that the 4-2-1 plan violated Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973 *et seq.*, and their rights under the Fourteenth and Fifteenth Amendments to the United States Constitution, and § 1983. Specifically, the plaintiffs complained that the then-existing electoral system in Jefferson Parish diluted black voting strength. After a bench trial, the district court ruled that "the minority group is sufficiently large and geographically compact to constitute a majority within a single-member district."[5] The district court also found that the black residents of Jefferson Parish were politically cohesive, *see id.* at 1006, and that the Parish's electoral system impeded the ability of minority voters to elect representatives of their choice. *See id.* at 1001. The court rejected a proposed black-majority district and ordered the parties to submit alternative plans.

On February 16, 1990, the parties adopted a plan which included six single-member districts and one at-large district ("February 1990 Plan"). The district court subsequently approved the plan. Of the single member districts, District 3 contained a black majority with a total black population of 51.7%, according to the 1980 Census, and 56.3% black voter registration. On May 10, 1990, the Attorney General precleared this plan under Section 5 of the Voting

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[5] The district court, invoking FED. R. CIV. P. 52(b), amended its prior finding that blacks were widely dispersed throughout the district and ruled that "the minority group is sufficiently large and geographically compact to costitute a majority within a single-member district." *East Jefferson Coalition for Leadership v. Parish of Jefferson*, 926 F.2d 487, 491 (5th Cir. 1991).

Rights Act.[6] The Department of Justice ("DOJ") precleared the Parish's alternative plan. On appeal, the Parish challenged the district court's findings that the minority group was sufficiently large and geographically compact to constitute a single-member district; that the minority group is politically cohesive; and that a bloc voting white majority usually defeats the minority's preferred candidate. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (establishing theses[sic] as the three necessary preconditions to make a claim under § 2 of the Voting Rights Act).[7] This court affirmed and remanded for implementation of the February 1990 Plan. *See East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson ("EJC")*, 926 F.2d 487, 494 (5th Cir. 1991).

B

After remand from this court, the district court held a status conference stating that the Feb. 1990 plan had to be modified to be in accord with the population variances triggered by the 1990 Census.[8] The 1990 Census reflected an increase in the black voting-age population ("BVAP"). Moreover, since District 3 had lost population overall, it required reconfiguration to avoid a constitutional one-

[6] Section 5 of the Voting Rights Act requires that any change in a standard, practice, or procedure with respect to voting by a "covered jurisdiction" be submitted to the United States Attorney General for prior approval or "preclearance." 42 U.S.C. § 1973c; 28 C.F.R. § 51.1 *et seq.* (1989).

[7] *See generally*, Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 343-46 (1998) (discussing section 2 of the Voting Rights Act and the Gingles preconditions).

[8] According to the 1990 Census, 448,306 people reside in Jefferson Parish, of whom 331,894 (74.0%) are white and 78,263) (17.5%) are black. These figures represent a 3.6% increase in the black population since the 1980 census although the overall population of the Parish decreased by approximately 6,300 people.

person, one-vote violation. The DOJ informed the attorneys for Jefferson Parish that it would require a benchmark, or a minimum 52.3% BVAP majority in District 3 in order to pre-clear a new redistricting plan drawn under the 1990 Census. The district court encouraged the parties to work together to formulate the necessary modifications and to adhere to a May 15, 1991 deadline for submission of the modified plan.

During the subsequent meetings among the Parish council members, each councilman brought certain political concerns to the attention of other councilpersons. One or more of the individual incumbent council members sought to include in their districts voters who could be expected to support them in a bid to gain reelection. Additionally, the Parish sought to avoid contests between incumbent council members. In this regard, District 2 also received significant attention because it was likely to feature a race between incumbent councilmen James Lawson and Lloyd Giardina.

During the ensuing negotiations, a number of proposals surfaced among the council members. Councilman James Lawson's plan (the "Lawson Plan" or "modified plan") garnered the most support because it permitted other incumbents to maintain as much of their pre-1988 districts as possible. It retained the six-and-one councilmanic scheme, with six single-member councilmanic districts and one at-large seat ("6-1"). Additional adjustments were made to accommodate a particularly vocal constituent, Ida Saik, a resident of Maplewood.[9] The Lawson Plan split some pre-

[9] Ms. Ida Saik was the only Jefferson Parish resident who voiced her concerns to Councilperson T. J. Ward regarding the challenged redistricting plan during the 1991 negotiation process and through the time before the challenged plan was adopted by the Parish Council. Ms. Saik adamantly expressed her views and frequently contacted councilpersons to ensure that her concerns were reflected in the final proposal.

cincts to accommodate changes in the numbers of registered voters[10] and included a black majority councilmanic district, District 3, with a BVAP of 57.40%. By resolution No. 69122, passed on May 8, 1991, the Jefferson Parish Council adopted the modified plan. All of the council members, with the exception of Giardina, voted in favor of the modified plan.

On May 15, 1991, Jefferson Parish filed the modified plan with the district court but the district court rejected the modified plan and admonished the parties for letting "politics" enter the districting process. The district court appointed a special master to draw up a redistricting proposal for the court. On June 10, 1991, the special master submitted a 6-1 redistricting plan to the district court containing a black councilmanic district with 49% BVAP, a BVAP percentage less than the BVAP adopted in the Lawson plan. The trial court entered its judgment implementing the redistricting plan drawn by the special master but a panel of this court, in an unpublished *per curiam* opinion, found that the plan was a "Judge Made Plan" and impermissibly intruded "into the bailiwick of the legislative branch of local governments."

This court further found that the special master's plan "must fall for failure to include one district with a majority black voting age population." We held that the district court "should promptly adopt and implement a plan that, while applying the 1990 census data, otherwise remains as faithful as practicable to 'the' Plan, including a black voting age majority in District No. 3." This court also approved the

[10] Jefferson Parish had often been required to split precincts prior to the 1991 redistricting of its Parish Council in order to accommodate changes in the numbers of registered voters in particular voting precincts or changes in State House and Senate district lines.

modified redistricting plan submitted by the Jefferson Parish Council and instructed the trial court to issue an injunction directing the Parish to submit the modified plan to the DOJ for expedited review under section 5 of the Voting Rights Act. Thereafter, pursuant to our instructions, the district court was to order the implementation of the modified plan immediately upon receipt of the notice of pre-clearance.

After our decision and the district court's subsequent judgment revoking its previous judgment and ordering the Parish to submit the modified plan for preclearance, the Parish Council complied. The Parish Council submitted the modified plan to the DOJ by letter dated August 15, 1991.[11] The DOJ responded on August 27, 1991, in a letter which stated that the Attorney General did not interpose any objection to the specified change. The first elections using the modified plan were held in 1991. Two African-American candidates advanced to the run-off in District 3, and Donald R. Jones was elected to the Parish Council.[12]

C

On July 28, 1995, Dennis Theriot and six other registered voters in District 3, along with the Maplewood Civic Association (collectively, the "Appellants"), brought suit against the Parish and Parish Council officials challenging the configuration of District 3. The Appellants deemed

[11] Again, the modified plan included a seven-member Parish Council comprised of six single-member districts and one at-large district. The black majority councilmanic district included a black voting age population of 57.4% under the 1990 Decennial Census.

[12] Donald R. Jones's election as the council representative for District 3 marked the first time this century that an African-American was elected to the Jefferson Parish Council. He successfully ran for re-election in 1995.

District 3 a racial gerrymander in violation of the Fourteenth and Fifteenth Amendments to the Constitution, and the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* (1994). The Appellants argued that their political voice was diluted by the fact that the Maplewood community is divided between District 3, represented by Councilperson Jones, and District 1, represented by Councilperson Ward. [13] In May 1996, the district court permitted the United States, the City of Kenner and various other Kenner officials to intervene to defend the plan.[14] After discovery and extensive motion practice, Judge Stanwood R. Duval, Jr., conducted a bench trial from March 10, 1997 to March 12, 1997. On April 25, 1997, he entered judgment for the Defendants.

The district court made findings of fact and drew conclusions of law. Factually, the district court found that political incumbency "drove the pencil" in designing District 3. One-person and one-vote considerations were paramount in configuring District 3 which the district court determined was sufficiently compact. In its discussion of compactness and contiguity, the district court described the geography of the Parish and the location of predominantly black communities within the Parish. The district court further found that the Parish was not unaccustomed to splitting districts in order to achieve political goals. The district court identified communities of interest within District 3 and found that an increase in the BVAP justified using a 52.3%

[13]Both councilpersons have supported programs in and beneficial to Maplewood.

[14]The Kenner Defendants intervened in this lawsuit to assert their interest in the continued three-way split of Kenner and Kenner residents' access to and influence over three council members elected from single-member districts and one council member elected at large.

benchmark for determining retrogression under Section 5 of the Voting Rights Act. Finally, the district court found, as a matter of fact, that vestiges of discrimination remain in Jefferson Parish.

As a matter of law, the district court held that the Appellants failed to carry their burden of proof regarding the predominance of race in the configuration of District 3. Consequently, the district court declined to apply strict scrutiny. The shape of the district, according to the district court, did not demonstrate circumstantially that race motivated the form of the district because District 3 was not configured to appear similar to a "Rorschac ink-blot;" "a bug splattered on a windshield;" or "a sacred Mayan bird." In short, because District 3 does not wind in a serpentine fashion, the district court found that it did not have any of the visual indices apparently obvious in in *Hays v. State of Louisiana*, 515 U.S. 737 (1995), *Miller v. Johnson*, 515 U.S. 900 (1995); and *Shaw v. Reno*, 509 U.S. 630 (1993)("Shaw I").

The district court further held that since it had determined that strict scrutiny did not apply and that no constitutional violation had occurred, no harm resulted in re-evaluating the issues in light of *Shaw* I and its progeny. In its conclusion, the district court emphasized that strict scrutiny did not apply yet explained that, even if it did, District 3 is narrowly tailored to meet a compelling State interest.

The district court denied Appellants' subsequent motions for a new trial or otherwise alter the judgment of the district court. On July 15, 1997, Appellants timely appealed the district court's judgment.

Appellants raise six issues on appeal.[15] We seek to determine whether the district court erred in (1) ruling that race did not predominate in the creation of the current District 3; (2) declining to apply strict scrutiny to the legislative act creating District 3; (3) ruling that a 52.3% black-voting age population was required in order to avoid a section 5 retrogression violation; (4) admitting and relying upon evidence pertaining to community-of-interest testimony and data assembled after the actual drawing of the districts; (5) making certain factual findings predicated on its assessment of witness credibility; and (6) granting defendants' motion to quash the depositions of counsel, Harry Rosenberg and M. Nan Alessandra.[16]

A

Appellants bear the burden of proving an impermissible racial classification. *See Miller v. Johnson*, 515 U.S.

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[15] During our adjudication of this matter, the Supreme Court issued its decision in *Hunt v. Cromartie*, 119 S.Ct. 1545 (1999). In *Hunt*, the Supreme Court addressed a challenge to North Carolina's Twelfth Congressional District as the product of unconstitutional racial gerrymandering. The Court held that it was an error for the district court to resolve the disputed fact of intent at the summary judgment stage. Substantively, *Hunt* is most instructive in those instances where voting rights challenges have been resolved after adjudicating a dispositive motion. In that regard, the posture of this case significantly differs from *Hunt*. The district court's resolution of the issues in this case occurred in the context of a three-day trial during which 55 exhibits were introduced and 22 witnesses testified.

[16] As we turn to the merits of these issues, we are mindful of our decision in *EJC*, affirming the district court's finding that the Parish's electoral voting scheme violated Section 2 of the Voting Rights Act. *See EJC*, 926 F.2d at 487. Because of the need to remedy the Section 2 violation, race was considered in drawing a plan with a majority-minority district. The relevance or consideration of race does not mandate a finding that race predominated.

900, 916 (1995). Appellants may rely upon circumstantial evidence of the district's shape and demographics or more direct evidence bearing upon legislative purpose. *See id.* The district court found that "traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual and shared interests," *see id.* at 916, were not subordinated to race in drawing District 3. We review the district court's determination that race did not predominate for clear error. *See Miller*, 515 U.S. at 917, see also *Shaw v. Hunt*, 517, U.S. 899, 905 (1996) (Shaw II). It is well settled that "[a] finding is 'clearly erroneous' when [,] although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

In an effort to manufacture clear error, Appellants challenge every aspect of the district court's opinion. They contend that testimony regarding the drawing of the current districts, the documentary evidence in the record, the shape of District 3, and the racial geography within the Parish provides direct and circumstantial evidence of an impermissible racial classification. We disagree. The record reveals no clear error inasmuch as incumbency protection, maintaining communities of interest, addressing one-person, one-vote concerns and natural geographic conditions predominated in drawing District 3.

1.

In *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion), the Supreme Court recognized, "[i]n some circumstances, incumbency protection might explain as well

as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines." *Id.* at 967. Much of the discussion among the Parish Council members during the 1991 redistricting negotiations with the *EJC* plantiffs centered on political concerns, particularly the likelihood that councilpersons Lawson and Giardina would each campaign for the single District 2 council seat. Each councilperson brought certain additional political and incumbency concerns to the negotiation process. Although the Lawson Plan resulted in a race between Lawson and Giardina in District 2, it garnered the most support because it met the political and incumbency concerns of the majority of existing councilpersons.

The record indicates that Councilperson Ward preferred the Lawson Plan because it resulted in fewer changes to his district, District 1. Councilperson Larry Hooper sought to maintain as much of his pre-1988 district as possible, particularly the communities of Kenner and River Ridge. He also voted for the Lawson plan. Councilperson Robert B. Evans, Jr. received no adverse comments from Parish residents concerning the adoption of the Lawson Plan and ultimately joined five other councilpersons in voting to adopt the plan. Councilperson Edmond Muniz similarly determined that the Lawson Plan was politically advantageous and improved his prospects for re-election. While this court's previous finding of a Section 2 violation required the Parish to redraw its districts, we find that the issue of race was plainly subordinate to the majority of the councilpersons' preoccupation with protecting incumbency and main-

taining other political advantages.[17]

We offer some examples of the testimony we found common throughout the proceedings and which support both the district court and our findings. Councilman Giardina testified:

Q. Was race the primary consideration in the drawing of the current district three?

A. The current district three?

Q. Yeah, primary?

A. Or the current district two?

Q. Current district three.

A. You can't answer one without the other, they go together.

THE COURT: Just answer the question as to district three right now and you can explain your answer.

THE WITNESS: I don't think so ... and the reason I'm saying I don't think so is because if you drew one district it related to the other district, you couldn't draw just district three [;] you had to draw six districts.

(Tr., Vol. 1, at 34). Later, Councilman Giardina testified on the relevance of politics:

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[17]Indeed, the residents of Kenner sought to intervene in this case in order to maintain a tripartite split of its community and the attendant ability to exert political influence in at least three districts.

Q. Let me go back to the districting process inolved[sic][;], did politics govern that process in your opinion?

A. It was the prevailing factor.

(Tr., Vol. I, at 43). In subsequent testimony, Councilman Giardina acknowledged the benefit the Lawson Plan offered to incumbent council members:

Q. That preference to keep their optimum areas was the driving force in their voting for the redistricting configuration that we have today, is that right?

A. That's absolutely right.

(Tr., Vol. 1, at 51).

Equally compelling is the testimony of Councilman Lawson:

Q. Isn't it a fact that in making the current districts you were trying to maximize the black-voter population of District.31?

A. I was trying to address the concerns of all Councilmen, you know. Bob Deviney would call me. Hooper would call me. Muniz would call me. "Butch" would call. Everybody was calling me and saying, "Look, Jim -"

MR. VARRECCHIO: Your Honor, that's not responsive.

THE WITNESS: "I want to make sure it's in here or there," so I was drawing a district that would address everyone's concerns, and this is what came out of it.

Q. I want to talk to you about District 3.....Isn't it a fact that you were trying to maximize the black population of District 3?

A. I think what I was trying to do was simply draw a district that I make sure of my incumbency that I could run in and at the same time make sure I had the right numbers of people in each council district.

(Tr., Vol. XVIII, at 87). Still not satisfied with Councilman Lawson's response, opposing counsel later asked essentially the same question again:

Q. Okay. In drawing the current District 3, would it be fair to say that race was your primary consideration in drawing its boundaries?

A. No ... I mean, I was looking to try to retain as much [of] my old district as possible.

(Tr., Vol. XVIII, at 125). Our review of the record leads us to conclude that the inclusion or exclusion of communities was inexorably tied to issues of

incumbency.[18]

2.

Like the district court, we also find that District 3 is composed of communities of interest.[19] In *Miller*, the Court held that "a State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." *Miller,* Miller, 515 U.S. at 920. States, however, may

[18]We distinguish this case from *Miller v. Johnson*, 515 U.S. 900 (1995). In *Miller*, the Court struck down Georgia's Eleventh Congressional District after finding that race was the predominating factor. *See Miller*, 515 U.S. at 918. The Court reached its decision with relative ease given concessions by the State of Georgia and evidence revealing the DOJ's insistence on certain racebased revisions to Georgia's redistricting plan. *See id.* at 917-18. The Court found that the State of Georgia had acquiesced to the DOJ's "maximization agenda"which the DOJ had made clear through its letters objecting to proposed districts and by three preclearance rounds. *See id.* at 917. Additionally, the State of Georgia conceded that it added certain communities and split other communities with the main objective of increasing the black population of the Eleventh Congressional District. *See id.* at 918.

Stated simply, there was no proverbial big brother manipulating the process of drawing the districts. The Parish did not abdicate its responsibilities to the DOJ or confront pressure to include or exclude communities. When requested, the DOJ properly advised the Parish of a benchmark under Section 5 of the Voting Rights Act. Nevertheless, among other evidence, Appellants highlight Parish Council research staffer Gandolfi's letter to the DOJ explaining that particular precincts were split to enhance both the black population and the BVAP of District 3. Yet at trial, even Gandolfi concluded that political considerations were paramount in the design of the Lawson plan.

[19] In this section, we also address the merits of Appellants' fourth issue: whether the district court erred in admitting evidence bearing upon communities of interest. Again, we find no clear error.

not engage in racial stereotyping, that is, assuming that the voters of the same race "think alike," share the same political interests, and prefer the same candidates. *See id.* (explaining that racial stereotyping is at odds with equal protection mandates). The same logic applies to Jefferson Parish.

The record indicates that the neighborhoods and subdivisions that now make up District 3 contain low-income residents who are less-educated, more often unemployed, and more poorly-housed than voters in other districts.[20] District 3 residents have common social and economic needs. *See Lawyer v. Department of Justice*, 521 U.S. 567, 581 (1997) (finding a community of interests as predominantly urban and low-income even though the district crossed the Tampa Bay). Given the common thread which binds the black voters within District 3, they "are entitled to an effective voice in the electoral process and to an influence over the outcome of elections." *See East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 691

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[20]A plethora of civic and community organizations dedicated to addressing issues of housing, education and poverty exist within Jefferson Parish and District 3. Political organizations whose members are predominantly black existed in Jefferson Parish as early as the 1940s. Generally these groups draw their memberships from Kenner, Bunche Village, Little Farms, Lincoln Manor, and other predominantly black neighborhoods on the East Bank. These organizations also have drawn support from Marrero, Avondale, Harvey, and other black neighborhoods located on the West Bank. Since their inception, some of these organizations have lobbied for paved streets and water and sewer lines. Others were organized to improve recreation facilities, reduce traffic, combat crime and drugs, and improve drainage. Razing dilapidated housing emerged as a focal point for another organization. Many of these social ills continue to infect the communities making up District 3.

F. Supp. 991, 1008 (E.D. La. 1988).

Additionally, we reject Appellants' argument that information pertaining to the socioeconomic conditions of the Parish was not properly before the district court since the data was not available to the councilpersons at the time they drew the districts. Appellants rely on the Supreme Court's decision in *Vera*. There the Court refused to overturn the district court's finding that race predominated over other traditional redistricting principles particularly since the State of Texas's supporting data was not available to the Legislature in any organized fashion before the challenged district was created. *See Vera*, 517 U.S. at 966. The Court also held that the State was not required to compile a comprehensive administrative record and courts are not required to dismiss facts not explicitly mentioned in the redistricting plan's legislative history. *See Vera*, 517 U.S. at 966.

We find that the issues facing Jefferson Parish, including those that affect citizens who reside in the current District 3, are not new; rather they are remnants of the historical subjugation of blacks in the State of Louisiana and in Jefferson Parish. Indeed, evidence concerning the socio-economic conditions of the Parish's neighborhoods and subdivisions was produced in the preceding *EJC* litigation, see e.g., *EJC*, 926 F.2d at 490 (exploring issues of political cohesion), as well as in this case. Many of the same councilpersons were involved in the preceding litigation and are well aware of the socio-economic conditions throughout Jefferson Parish.

We similarly decline to find clear error in the district court's determination that overwhelming evidence demonstrated that one-person, one-vote considerations were para-

mount in configuring the districts. The one-person, one-vote provision requires districts to achieve population equality "as nearly as is practicable." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997). The record includes the testimony of Kenneth Hughes, the Director of the Council's Research and Budget Staff, and Alan Gandolfi, a research analyst and staff attorney. Both testified that one-person, one-vote considerations emerged as their primary concern while working on the various redistricting plans. Additionally, the record reveals a cause and effect relationship between Lawson's efforts to include politically advantageous communities in District 2 and alterations to the boundaries of District 3 to satisfy one-person, one vote requirements. Overall, we find that the district court's conclusion that one-person, one-vote concerns were paramount is fully supported by the record.

4.

Geographically, the district court found that the past redistricting tradition in Jefferson Parish did not strictly adhere to geometric standards of compactness. According to the district court, the "very irregular" geography and topography of the Parish (including the fact that it is 50% water) substantially limits the ability of the Parish to adhere to such standards. Consequently, the district court rejected Appellants' assertion that the District was bizarre on its face.[21] We agree and find that any irregularity associated with the shape of District 3 is derivative of politics, joining communities of interest, one-person, one-vote concerns, and

[21] The district appears "V" in shape.

the geography and population distribution in the Parish.[22] With regard to geography and demographics, it is most apparent that the black population resides in an east-west direction, as opposed to north-south. Consequently, remedying the Section 2 violation required a district which, in some measure, proceeded in an east-west direction rather than the usual north-south direction.

5.

In short we are not persuaded that the district court erred in finding that race did not predominate in drawing District 3. The record presents bountiful evidence supporting the district court's finding that political incumbency, communities of interest, one-person, one-vote, and geography dwarf issues pertaining to race. We find particularly relevant the following colloquy between the court and Mr. Gandolfi:

THE COURT: To some extent, right down to this case, to some extent, if you look at the shape of these districts, certainly race had some thing to do with the shape you adopted?

THE WITNESS: Certainly, we had to maintain that majority black.

THE COURT: To some extent, one man one vote dicates the shape?

THE WITNESS: Right.

THE COURT: And to some extent, the geographical boundary of the Parish dictates the shape?

[22] Like the district court, we disregard the division or splitting of unpopulated precincts to ensure contiguous districts because no communities of interests were affected.

THE WITNESS: To a great extent.

THE COURT: And to some extent incumbency and political concerns dictate the shape?

THE WITNESS: I would say of the four criteria you just mentioned, the last one, the political concerns had the most effect on exactly how those other three goals were achieved. There were different ways of doing it. (Tr., Vol. 1, at 147).

Appellants implicitly argue that *any* consideration of race, even where such consideration is *de minimis*, mandates a finding that race predominates. This implication or argument has been squarely rejected by *Miller, Vera, Abrams* and the *EJC* litigation; therefore, we cannot agree.[23] Issues of race were relevant, inasmuch as the Parish Council was directed to remedy a Section 2 violation, yet did not predominate.

B

Strict scrutiny analysis is required when a plaintiff proves that race is the "predominant factor" motivating a redistricting decision. See *Miller*, 515 U.S. at 920. The Supreme Court has recognized that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race .... Nor does it apply to all cases of intentional creation of majority-minority districts." *Bush*, 517 U.S. at 958. In like manner, this court has opined that "strict scruti-

[23] If we were to follow Appellants' argument to its logical conclusion, no court could find or ever require any jurisdiction to address a Section 2 violation because race emerges as a relevant issue. Indeed, much of Appellants' argument appears designed collaterally to attack this court's previous finding of a Section 2 violation.

ny does not apply to all cases involving the intentional creation of majority-minority districts." *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1404 (5th Cir. 1996). Race is inherently a consideration where, as here, a governing body must respond to violations of Section 2 of the Voting Rights Act. *See id.* at 1407.

Had the Appellants demonstrated that race was the predominant factor, the burden would have been on the Parish to demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. See *Miller*, 515 U.S. at 920. Again, the Appellants have failed to demonstrate that race predominated, a prerequisite for strict scrutiny analysis. In an abundance of caution, the district court discussed the merits of this issue; we decline to follow a similar course and turn our attention to the next issue, avoiding a Section 5 retrogression violation.

C

Jefferson Parish is covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Consequently, the Parish may not "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it secures preclearance. Preclearance is achieved in one of two ways, filing a declaratory judgment action in the United States District Court for the District of Columbia or submitting the change to the United States Attorney General. In either forum, it is incumbent upon the Parish, or submitting jurisdiction, to prove that the voting change does not have a discriminatory purpose or effect. Changes which have not been pre-cleared are unenforceable. *See* 42 U.S.C. § 1973c; *Clark v. Roemer,*

500 U.S. 646 (1991).

In *Beer v. United States*, 425 U.S. 130, 141 (1976), the Court held that a voting change may not be pre-cleared if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Retrogression occurs when "the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting." *Id.* at 141. Generally, a determination of retrogression requires a comparison between the proposed voting change and the last legally enforceable practice or procedure used by the jurisdiction. *See* 28 C.F.R. 51.54 (b)(1) (1999). The latter is commonly referred to as a benchmark.

The district court found, as a matter of fact, that Jefferson Parish was justified in using 52.3% BVAP as the appropriate benchmark for determining retrogression under Section 5. The district court based its determination on the increase in the black population in District 3 under the findings of the 1990 Census. While the Lawson Plan overshot the benchmark by nearly 5 percentage points, the district court found that the Appellants had not demonstrated that the DOJ coerced the Parish into designing a district that maximizes District 3's black population as criticized in *Miller*. We review the district court's findings of fact for clear error and find none. *See* FED. R. Civ. P. 52(a).

We reject the Appellants' reliance on *Abrams* and *Young v. Fordice*, 520 U.S. 273 (1997) to argue that only the last districting scheme used by the jurisdiction to hold elections is the proper benchmark. Appellants have misread both

cases.[24] In *Abrams*, the Supreme Court rejected appellants' proposed benchmark because it had never been in effect and was found to be unconstitutional. *See Abrams, 521 U.S.* U.S. at 96-97. The plan for unitary voter registration for state and federal elections at issue in *Young* suffered similar deficiencies. Specifically, the Court found that the plan was not "in force or effect" because those seeking to administer the plan had abandoned it as soon as its unlawfulness became apparent.

Appellants' invitation to disregard census data in favor of outdated information is impractical. The parties realized the 1990 Census would impact redistricting; therefore, they promulgated an interim plan. Once the 1990 Census provided figures which were not favorable to the Appellants, they sought to disregard its import. Nevertheless, the interim plan was pre-cleared and upheld by the court. A majority-minority district which fell below the documented increase in the BVAP would have been subject to a Section 2 challenge.

By insisting on benchmark figures wholly inconsistent with increases in the BVAP, Appellants attempt to sentence minorities complaining of vote-dilution to a fate sim-

[24] Appellants read these cases as requiring the district court to use the last districting scheme used by the jurisdiction to hold elections as the proper benchmark. Accordingly, Appellants reject the March 1990 interim districting plan as establishing the benchmark. Instead, Appellants never disclose what the benchmark should have been, but seem to suggest that 46% was the proper benchmark. Appellants deem "ameliorative" all of the post-1990 Census "6-1 " plans and argue that the post-1990 Census plans violate Supreme Court precedent because the DOJ forced the Parish Council to adopt a plan with maximum benefits to minority voters. To substantiate its argument, Appellants exaggerate and misconstrue the nature of the communications between the DOJ and the Parish Council.

ilar to Sisyphus .[25] Even though this court has found a Section 2 violation and required the parties to make adjustments based on the 1990 Census, Appellants would have us turn the Appellees away and have them prove a Section 2 violation all over again. We decline to impose such a requirement. Once a litigant has demonstrated vote dilution and the court has directed redress, the litigant need not prove vote dilution once again before a court can assess the merits of the proposed remedy. Otherwise, it is conceivable that courts may never reach the merits of the proposed remedy. Appellants have failed to demonstrate clear error. Again, we are satisfied that to the extent the current District 3 exceeds the benchmark, political incumbency and other political concerns were the driving force.

D

Appellants argue that the trial court erred in deciding which witnesses to credit and which to discount at trial. Factual findings from a bench trial are reviewed under the clearly erroneous standard. *See Odum v. Frank*, 3 F.3d 839 (5th Cir. 1993); FED. R. Civ. P. RULE 52(a). A finding is clearly erroneous when despite evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *See Cupit v. McClanahan Contractors. Inc.*, 1 F.3d 346, 348 (5th Cir. 1993). We conduct our review to determine whether the district court's account of the evidence is plausible in light of the record. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Where the evidence can support find-

[25] Zeus sentenced Sisyphus, the mythical King of Corinth, to an eternity in Hades trying to push a boulder uphill to the top. Yet every time Sisyphus neared the crest, the weight of the rock would turn it back and the rock would rol back towards the plain. ***See*** Homer, The ODYSSEY,(E.V. Rieu & D.C. H. Rieu trans., Penguin Classics 1991).

ings either way, a choice by the trial judge between two permissible views of the weight of the evidence is not clearly erroneous. *See id.*

The burden of showing that the findings of a district court are clearly erroneous is heavier if credibility of witnesses is a factor in the district court's determination. *See Coury v. Prot,* 85 F.3d 244, 254 (5th Cir. 1996). A trial court's decision to credit the testimony of one, two, or more witnesses, each of whom has told a coherent, facially-plausible story that is not contradicted by extrinsic evidence, and can virtually never be clear error. *See Justiss Oil Co., Inc. v. Kerr-McGee Refining Corp.,* 75 F.3d 1057 (5th Cir. 1996). Appellants' argument fails to surpass the standard of review under clear error. As opposed to directing this court's attention to extrinsic evidence, Appellants use positive adjectives to describe beneficial testimony and negative adjectives to describe unfavorable testimony. However, the district court's analysis turns on choosing between plausible alternatives and Appellants have failed to show clear error in this regard. This court declines to depart from the district court's assessment of the credibility of the witnesses except in the rarest of circumstances. *See Travelers Indem. Co. v. Clavert Fire Ins. Co.,* 798 F.2d 826, 836 (5th Cir. 1986). We have reviewed the record and are satisfied that the evidence supports the district court's assessment of witness credibility.

E

We review a district court's decision denying discovery, including quashing deposition subpoenas, for abuse of discretion. *See Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110,112

(5th Cir. 1994); *see also Hastings v. N. E. Indep. Sch. Dist.*, 615 F.2d 628 (5th Cir. 1980).

The magistrate judge rejected the Appellants' argument that they were entitled to take the depositions of defendants' trial attorneys, Harry Rosenberg and M. Nan Alessandra. The magistrate judge found that "plaintiff-intervenor's [Cleta White] premise that defendant's attorneys are the only persons with information about how or why redistricting or a remedy occurred is rank speculation hovering near the absurd." In like manner, the district court rejected this argument. Nevertheless, the district court did provide the Appellants with an alternative to deposing the Parish's attorneys, by stating that "the record in this case is voluminous and presents a more than adequate alternative source for the proof intervenor's counsel seeks to meet the standard of *Miller*."

Notwithstanding Appellants' reference to material outside the record, Appellants have not met the high standard for demonstrating abuse of discretion.[26] The entire record in the *EJC* case was available to the parties in this litigation. Moreover, the district court referred the Appellants to John Tanner of the DOJ as the person who would have the best knowledge and information regarding the sought information. Deposing Rosenberg and Alessandra was also complicated by the fact that they were counsel for the opposing side. Generally, federal courts have disfavored the practice of taking the deposition of a party's attorney; instead, the practice should be employed only in limited circumstances.

[26]An appellate court may not consider new evidence furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling. *See Great Plains Equip.. Inc. v. Koch Gathering Sys.. Inc.*, 45 F.3d 962 (5th Cir. 1995).

See Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). Given the alternatives and Appellants' failure to demonstrate abuse of discretion, this claim must fail.

Resolution of this case turns on the issue of whether race predominated in the redistricting plan. Like the district court before us, we cannot find that race predominated. While relevant, issues pertaining to race were subordinated to concerns for political incumbency, joining communities of interest, satisfying one-person, one-vote requirements, and geographical realities. Since the Appellants fail to demonstrate that race predominated, we need not apply strict scrutiny analysis to the formation of District 3. They[sic] record and Judge Duval's well-supported findings reflect careful, thorough consideration of the issues in this sensitive case. The judgment of the district court is therefore AFFIRMED.

APPENDIX B

FILED
July 15 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENNIS THERIOT, ANN RODRIGUEZ, RONALD PERRIN, NORMAN A. RONQUILLE, DAVID J. DOWELL, IRIS C. ISEMANN, HERMAN J. CARBO, JOANNE M. MIRE, IDA SAIK, and MAPLEWOOD CIVIC ASSO. INC.	) CIVIL ACTION) No. 95-2453) SECTION K) JUDGE) DUVAL
versus	)
THE PARISH OF JEFFERSON, STATE OF LOUISIANA, MICHAEL YENNI, in his official capacity as President of Jefferson Parish, ROBERT B. EVANS JR. in his official capacity as Chairman of the Jefferson Parish Council, T.J. "BUTCH" WARD, JAMES LAWSON, JR., DONALD JONES, EDMOND MUNIZ, ANNE MARIE VANDENWEGHE, and NICK GIAMBELLUCA, in their official capacities as members of the Parish Council, Parish of Jefferson, State of Louisiana.	)MAG. DIV.1)MAG. JUDGE

NOTICE OF APPEAL

Notice is hereby given that Dennis Theriot, Ann Rodriguez, Ronald Perrin, Norman A. Ronquille, David J. Dowell, Iris C. Isemann, Herman J. Carbo, and Maplewood

Civic Association, Inc., plaintiffs in the above-mentioned case, hereby appeal to the United States Court of Appeals for the Fifth Circuit from all but the below-mentioned portions of the final judgment entered herein on April 25, 1997, and with respect to which judgment a motion for new trial or alternative relief was denied by order entered June 20, 1997; plaintiffs-appellants do not appeal, however, from the dismissals from this case, by the said judgment, of Robert Namer, Thomas Codella, Cleta White, W. Fox McKeithen in his capacity as Secretary of State for the State of Louisiana, and Jerry Fowler in his official capacity as Commissioner of Elections for the State of Louisiana, nor do plaintiffs appellants appeal from the said judgment insofar as it relieves plaintiffs from payment of the costs incurred by defendants.

Respectfully submitted this15th day of July, 1997.

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By: /S/ H. H. Hillyer III
H.H. Hillyer III

CERTIFICATE OF SERVICE

I CERTIFY that copies of the foregoing will have been served upon all opposing counsel promptly after the filing hereof, by hand delivery, facsimile transmission, and/or United States mail, on this 15th day of July, 1997.

/S/ H. H. Hillyer III

H.H. Hillyer III

APPENDIX C

Filed
April 24 1997
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENNIS THERIOT, et al	CIVIL ACTION
VERSUS	NO. 95-2453
JEFFERSON PARISH, et al	SECTION "K"

JUDGMENT

This action came on for bench trial on March 10, 1997, before the court, the Honorable Stanwood R. Duval, Jr., presiding, and the issues and claims against the defendants having been duly tried, and after a review of memoranda, findings of fact and conclusions of law submitted by all parties, and for the reasons assigned in the order and reasons signed this date,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, the Parish of Jefferson, Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council, John Lavarine, in his official capacity as a member of the Jefferson Parish Council, T. J. Ward, in his official capacity as a member of the Jefferson Parish Council, Donald Jones, in his official capacity as a member of the Jefferson Parish Council, Edmond Muniz, in his official capacity as a member of the Jefferson Parish Council, Nick Giambelluca, in his official capacity as a member of the Jefferson Parish Council, Lloyd F. Giardina, in his official capacity as a member of the Jefferson Parish Council, Timothy Coulon, in his official capacity as President of Jefferson Parish, the

United State of America, intervenor/defendant, Provino Mosca intervenor/defendant, the Council of the City of Kenner, Terry McCarthy, Betty Bonura, Marc Johnson, Jeannie Black, John Lavarnie, III Michael Branigan, Phil Capitano, in their official capacities as members of the Council of the City of Kenner, intervenors/defendants, and against the plaintiffs, Dennis Theriot, Ann Rodriguez, Ronald Perrin, Norman A. Ronquille, Daniel J. Dowell,Iris C. Isemann, Herman J. Carbo, and Maplewood Civic Association, Inc., dismissing their complaint with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as a result of previous motions to dismiss and rulings thereon, that Joanne M. Mire, Ida Saik, Robert Namer and Thomas Codella, are dismissed as plaintiffs in these proceedings with prejudice, for the reasons stated in the minute entries previously rendered herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Cleta White is dismissed as a plaintiff herein with prejudice by virtue of the motion to dismiss previously filed by Cleta White and granted by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that W. Fox McKeithen, in his official capacity as Secretary of State for the State of Louisiana, and Jerry Fowler, in his official capacity as Commissioner of Elections for the State of Louisiana, are dismissed as defendants with prejudice, by virtue of the ruling on the previous motion to dismiss filed in these proceedings for the reasons set forth in the minute entry dismissing these defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each party shall bear his, her or its respec-

tive costs.

New Orleans, Louisiana, this 24th day of April, 1997.

/S/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed April 24 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENNIS THERIOT, ET AL.	CIVIL ACTION
VERSUS	N0. 95-2453
THE PARISH OF JEFFERSON	SECTION "K"(1)

ORDER AND REASONS

Plaintiffs Dennis Theriot, Ann Rodriquez, Ronald Perrin, Norman A. Ronquille, David J. Dowell, Iris C. Isenmann, Herman J. Carbo and the Maplewood Civic Association, Inc. brought the instant suit against the Parish of Jefferson, et al.[1] (referred to *in globo* as "Defendants" or "Jefferson Parish"). Plaintiffs seek to have the Court declare the present configuration of the Third Councilmanic District of the Parish of Jefferson ("District 3") unconstitutional contending that it constitutes an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. Plaintiffs rely primarily on *Shaw v. Reno*, 113 S. Ct. 2816 ("*Shaw I*") and *Miller v. Johnson*, 115 S. Ct. 2475

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[1] Plaintiffs also named Michael J. Yenni, then President of Jefferson Parish, Robert Evans, Jr., T.J. "Butch" Ward, James Lawson, Jr., Donald Jones, Edward Muniz, Anne Marie Vanderweghe, and Nick Giambelluca. These persons were all members of the Parish Council for the Parish of Jefferson (also collectively referred to as "defendants. "

Prior to trial, pursuant to Fed. R. Civ. P. 25(d)(1), parties described herein were substituted as the result of the death of Michael J. Yenni and the results of the intervening elections.

(1995) for this proposition. Trial was held before the Court without a jury and the matter taken under submission. Having thoroughly reviewed the record, evidence, deposition testimony, memoranda and the relevant law, the Court has determined that defendants are entitled to judgment for the reasons that follow.

To the extent that any findings of fact are conclusions of law, they are adopted as such; to the extent that any conclusions of law are findings of fact, they are so adopted.

FINDINGS OF FACT

The Parties and Jurisdiction

The plaintiffs noted above are seven registered voters who reside in District 3. The remaining plaintiff, Maplewood Civic Association, Inc. is a Louisiana not-for-profit corporation domiciled in Jefferson Parish, whose members are some of the registered voters residing in the Maplewood Subdivision, and a majority of whose members reside and are registered voters in District 3.

Plaintiff-Intervenor, Provino Mosca, is a person of the full age of majority and a resident of Harahan, Louisiana.

The Parish of Jefferson is a political subdivision of the State of Louisiana. The defendants at the time of trial were Tim Coulon, in his official capacity as President of the Parish of Jefferson; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T.J. "Butch" Ward, Lloyd F. Giardina, Donald R. Jones, Edmund J. Muniz, John Lavarine, and Nicholas Giambelluca, Sr. as

current members of the Jefferson Parish Council, who have been sued by plaintiffs in their official capacities. These defendants were and have been acting under the color of the statutes, ordinances, regulations, customs and usages of the State of Louisiana, Parish of Jefferson.

The Civil Rights Division of the Department of Justice intervened ("DOJ") and is aligned with defendants.

The Council of the City of Kenner ("Kenner")[2] also intervened in this matter to assert their interest in the continued three-way split of Kenner and Kenner residents' access to and influence over three council members elected from single member districts and one council member elected at large to the Jefferson Parish Council. Kenner is aligned with the defendants at this phase of the proceeding.

Although this matter was brought as a class action, no timely motion for certification was filed. Therefore, this action is not a class action.

The Court exercises its original jurisdiction over this action pursuant to 42 U.S. C. § 1983 28 U.S.C. §§ 2201 and 2202.

Background

This case is preceded by a long and tortured history. As a result, an overview of its history is necessary to place the facts of this case in context. These facts are basically uncontested and as such the Court finds them to be true.

[2] The Council of the City of Kenner is the duly authorized legislative body of the City of Kenner pursuant to its Charter. Terry McCarthy, Betty Bonura, Marc Johnson, Jeannie Black, John Lavarine, III, Michele Branigan and Phil Capitano are the elected members thereof.

The Parish of Jefferson is a political subdivision of the State of Louisiana and as such is subject to the strictures of the Voting Rights Act. The Jefferson Parish Council is a governmental body organized under the laws of the State of Louisiana. Pursuant to the Jefferson Parish Home Rule Charter, the Parish of Jefferson is governed by a Parish President and a council that is comprised of seven members. The Jefferson Parish Council is authorized to manage and operate parish government for the Parish of Jefferson, Louisiana.

Jefferson Parish is oddly-shaped and contains widely-diverse population. (See attached map of which the Court has taken judicial notice). The Parish stretches in a north-south direction with its largest population centers around the Mississippi River and Lake Pontchartrain. This area is reclaimed marsh land that was developed after World War II and much of the population growth began in the 1960's. South of this urban population surrounded by swamp are the areas of Lafitte and Barataria which are more rural in character. Further south crossing marsh, swamp, and water bodies, is Grand Isle which is 20 miles south of Barataria and is one of the foremost barrier islands for the State of Louisiana. This area is also rural in nature with fishing being its main source of income. Thus, the communities of interest vary within the Parish. Furthermore, those same geographic characteristics (uninhabitable marsh land) necessitate large, unpopulated land bridges to connect these diverse populated regions.

Beginning with its revised Home Rule Charter in 1957, Jefferson Parish changed from a police jury to a parish council form of government. The council members were elected through a combination of single-member, floterial,

and at-large districts. Each of the four districts elected one councilman. One member was elected form[sic] a floterial district comprised of Districts 1 and 2. Another floterial member was elected at-large from Districts 3 and 4. The seventh councilman, the Chairman, was elected from the Parish at-large. This arrangement was commonly known as the "4-2-1 Plan. "

In 1971, suit was brought, and the United States District Court for the Eastern District of Louisiana found that the districting plan for the Parish Council was malapportioned, and replaced it with a plan that satisfied the constitutionally required one-person, one-vote standard. *Grisbaum v. McKeithen*, 336 F. Supp. 267 (E.D.La. 1971). In the court-ordered plan, two of the four single-member districts crossed the Mississippi River in order to remedy the malapportionment of the existing districts. The districting plan ordered in *Grisbaum* resulted in Districts I and 2 being unusually shaped, with District 2 being very large in size, going from Grand Isle on the Gulf of Mexico to within a couple of miles of Lake Pontchartrain.

In January of 1986, a number of Jefferson Parish registered voters filed suit in a case entitled, *Cedric Floyd v. Parish of Jefferson*, C.A. 86-0265, alleging that the structure of the Jefferson Parish councilmanic districts violated the constitutional requirement of one-person, one vote. In 1987, as a consequence of that suit, the United States District Court for the Eastern District of Louisiana found that the districts were again in need of reapportionment. In a consent decree entered to settle the suit, the Parish Council amended its Home Rule Charter and reapportioned the councilmanic districts in accordance with that decree. That decree required that Jefferson Parish reapportion the four single member dis-

tricts to bring it into compliance with one-person, one-vote principles.

In the 1987 apportionment plan, Council District 1 included the easternmost portion of the Parish bounded by Orleans Parish to the east, Plaquemines Parish in the south, and Barataria Boulevard in the west (including Gretna, Harvey, and Marrero), and this area was connected by a narrow, largely uninhabited strip of land along the Mississippi River to an eighteen-sided corner of the East Bank (including the neighborhood of Southport and a portion of Metairie).

Council District 2 included the remainder of the West Bank bounded in the south by the Gulf of Mexico and Barataria Bay, in the west by St. Charles Parish, in the southwest by Lake Cataouatchi, and in the north by the Mississippi River, except where the district spanned the Mississippi River to include a nineteen-sided piece cut into the middle of the West Bank, extending as far to the north as I-10 bounded on the west by the Soniat Canal.

Council Districts 3 and 4 divided up the remainder of the East Bank. District 3 included Kenner and Harahan, the community of Riverbend, and the New Orleans Airport. District 4, the most compact of the districts, included the remainder of Metairie, as well as Bonnabel Place, Pontchartrain Shores and Pontchartrain Gardens.

The black portion of the population did not exceed 24 percent in any one of the districts under this plan.

This fact was not acceptable to a number of voters. The East Jefferson Coalition for Leadership and Develop-

ment ("the Coalition"), the Lincoln Manor Civic Association, and a number of registered voters in Jefferson filed suit against the Parish of Jefferson alleging that that plan for apportioning seats on the Jefferson Parish Council violated § 2[3] of the Voting Rights Act as the then existing system improperly diluted black voting strength. *East Jefferson Coalition for Leadership and Development, et al. v. Parish of Jefferson,* 691 F. Supp. 991 (E. D. La. 1988). As a result of that litigation, a number of findings, which have been judicially recognized as they apply to this case, were made.

The district court in that case found, *inter alia*, that (1) the minority group was sufficiently large and geographically compact to constitute a majority within a single-member district; (2) a historic pattern of racial discrimination existed and that vestiges of that discrimination remained; (3) blacks in Jefferson Parish were politically cohesive; (4) racial polarized voting existed in 1975 and 1979 councilmanic primary races; (5) when black candidates sought office in Jefferson Parish, a white bloc vote consistently defeated candidates favored by black voters and that candidates favored by blacks could win council seats in Jefferson Parish only when the preferred candidates were white. Thus, under the totality of circumstances employing the test found in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), the district court found the electoral system in Jefferson Parish impeded the ability of minority voters to elect representatives of

[3] Section 2 of the Voting Rights Act forbids state voting procedures which abridge voting rights "on account of race or color" and states that redistricting plans which provide "less opportunity [to minorities] than other members of the electorate to participate in the political process and to elect representative of their choice" abridge voting rights. 42 U.S.C. § 1973 (Supp. 1994). *DeWitt v. Wilson*, 856 F. Supp. 1409, 1410 (E.D.Cal. 1994).

their choice. The court held that Jefferson Parish was in violation of § 2 of the Voting Rights Act and ordered alternative plans from plaintiffs and defendants in that case to be submitted.[4]

The First Foray to Form District 3

Initially, Jefferson Parish proposed a " 6-2-1 Plan," which would have increased the size of the council from seven to nine members--6 from single-member districts, two members from single-member " superdistricts, " and one member at large. This plan created no black majority district; District 3, under this proposal had a 45.9% black population. In a Proposed Order dated January 19, 1989, the district court tentatively approved Jefferson Parish's Plan with one modification--the elimination of the two superdistricts. *East Jefferson Coalition v. Parish of Jefferson* , 703 F. Supp. 28 (E.D.La. 1989).[5] The court in that ruling recognized that the legislative body charged with the basic charter-invoked responsibility must be given the first opportunity to devise an acceptable remedial plan. Id. at 29. However, it rejected the superdistricts because the creation of three at-large seats "would be essentially (and impermissibly) guaranteed to be 'white seats' due to the relatively low overall percentage of blacks [parish wide]." Id. at 30. The court rejected Jefferson Parish's justification that superdistricts were necessary to represent the East and West Banks.

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[4]These facts were presented to the Court as uncontested in the parties' pre-trial order and are adopted by the Court as such.

[5]The Court has taken judicial notice of all of the preceding litigation and findings.

A fairness hearing was then held on March 2, 1989, the results of which were memorialized by the court in Order and Reasons found at 706 F. Supp. 470 (E.D.La. 1989). Apparently, Jefferson Parish accepted the *East Jefferson Coalition* court's elimination of the superdistricts and as such, the court approved the modified plan. In its order, the court noted that the plan likely would again be modified to reflect the 1990 Census before being implemented for the next set of parish elections to be held in 1991. Id.. at 472.

On March 7, 1989, the Jefferson Parish Council formally adopted this 6-1 plan. On July 7, 1989, the Court ordered Jefferson Parish to submit to the Attorney General the 6-1 redistricting plan and change in method of election for review pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c (" Section 5 ").[6] On September 1, 1989, the Parish submitted the plan to the Attorney General. This 6-1 plan still did not contain a black majority district; one district had a black population of 46 %. This September 1, 1989 plan was adopted by a vote of a majority of the Parish Council.

The First Majority-Minority, 6-1 Plan

On November 17, 1989, the Attorney General interposed an objection to the September 1, 1989 districting plan, pursuant to Section 5. The Coalition then sought to impose their seven single-member district plan, and the United States participated as *amicus curie* at the hearing of the plaintiffs' motion for implementation of their plan. Shortly

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[6] Section 5 of the Act prohibits a region subject to its provisions from implementing changes in any "standard, practice, or procedure with respect to voting" without authorization from the United States Attorney General. 42 U.S.C. § 1973c. *DeWitt v. Wilson*, 856 F. Supp. at 1410.

before the hearing, the parties to the *East Jefferson Coalition* case agreed upon a revised "6-1" districting plan that created one African-American majority district, District 3. It had a total black population of 51.7%, using the 1980 Census figures. The 1980 Census indicated that Jefferson Parish had a total population of 454,592 persons, of whom 380,645 (83.7%) were white and 63,001 (13.9%) were black.

On February 16, 1990, Jefferson Parish submitted a second six single member district plan to the Department of Justice for preclearance under Section 5, which included a district with a black-majority voting age population ("BVAP") of 51.7% . This plan was submitted to the Parish Council.

However, that plan was revised and superseded by a March 23, 1990 submission (the March 1990 plan)(Plaintiffs' Exhibit 33) to the DOJ for Jefferson Parish. It was adopted by a majority of the Council, including James Lawson. On May 10, 1990, the Attorney General precleared this plan. After the preclearance from the DOJ, the court approved the redistricting plan developed by the Jefferson Parish Council as the proper remedy to respond to the violations of the § 2 of the Voting Rights Act. On June 6, 1990, the district court entered a final order accepting the precleared plan.

The matter was appealed to the United States Court of Appeals for the Fifth Circuit. On March 21, 1991, the Fifth Circuit affirmed the district court's finding that the then-existing councilmanic structure was in violation of § 2 of the Voting Rights Act. *East Jefferson Coalition* , 926 F.2d 487 (5th Cir. 1991). The Fifth Circuit also remanded the case to the district court to "permit the district court to supervise

prompt implementation of the redistricting plan." Id. at 494.

After remand from the Fifth Circuit's March 21, 1991 ruling, the district court held a status conference stating that the plan had to be modified to accord with the population variances triggered by the 1990 Decennial Census. The court again encouraged the parties to work together to formulate the necessary modifications in an expedited fashion and to adhere to a May 15, 1991, deadline for submission of a modified redistricting plan.

Post-1990 Census--the Lawson Plan

In early 1991, the 1990 Census Data for Jefferson Parish had been released and showed that there was a substantial population deviation among the districts in this newly created districting plan. Jefferson Parish had a total population of 448,306 persons, of whom 74.0% were white and 17.5 % were African-American. District 3 as configured under the March 1990 adopted plan was shown to have a BVAP of 52.3 %.

Pursuant to the district court's directives, the Jefferson Parish Council modified the redistricting plan to accord with various changes necessitated by the latest census, and adopted the new plan by resolution on May 8, 1991. The modified redistricting plan retained the 6-1 councilmanic scheme, with six single-member councilmanic districts and one at-large seat. The plan also included an African-American majority councilmanic district, District 3, with a BVAP of 57.4 %, an increase of 5. 1 % in BVAP from the March 1990 configuration.

On May 15, 1991, the Parish of Jefferson filed its

modified plan with the district court in conjunction with a memorandum of law in support of the Council's proposal and a joint stipulation of the parties. The district court, however, appointed a special master. The plaintiffs in the *East Jefferson Coalition* case then requested that the district court order the parish to bide by the terms of the joint stipulation and submit the May 8, 1991 plan to the DOJ for preclearance. The trial court denied the plaintiffs' request for an injunction requiring submission of the plan for Section 5 review, and the plaintiffs filed an appeal with the Fifth Circuit. On June 10, 1991, the special master submitted a " 6-1 " redistricting plan to the district with a 49 % black voting age population, which was a reduction of the total black percentage in District 3 from the stipulated plan. On July 24, 1991, the trial court entered a Judgment implementing the redistricting plan drawn by the special master.

On appeal, on August 8, 1991, the Fifth Circuit approved the stipulated redistricting plan adopted by the Jefferson Parish Council on May 8, 1991, reversed the trial court's July 24th Judgment, and remanded the case to the district court. Specifically, the Fifth Circuit found the special master's plan to be a "Judge Made Plan" and that the district court had unlawfully intruded "into the bailiwick of the legislative branch of local governments. " In its ruling, the appellate court rejected the special master's plan for its failure, *inter alia,* to include one district with a majority black voting age population.

In its remand order the Fifth Circuit order specifically instructed the district court "to issue an injunction as soon as practicable, commanding [Jefferson Parish] to submit the May 8th Plan to the USAG for expedited review under § 5 of the VRA; and thereafter to ORDER implementation of

the May 8th plan immediately upon receipt of notice of preclearance of the May 8th Plan, assuming preclearance is timely forthcoming." *East Jefferson Coalition v. Parish of Jefferson,* C.A. No. 91-3511 and No. 91-3655, slip op. at 6 (5th Cir. August 8, 1991) (unpublished).

Accordingly, the district court issued a Judgment dated August 13, 1991, revoking its previous Judgment of July 24, 1991, and ordering that the Jefferson Parish Council immediately submit the May 8th plan for preclearance in accordance with Section 5. Jefferson Parish complied with that order and on August 27, 1991, the DOJ precleared the stipulated plan of May 8, 1991. It is that plan which is the subject of this suit.

The Final Plan Based on the 1990 Census Results.

The foregoing, uncontested facts indicate in only a minor way the contention, acrimony and difficulties encountered in arriving at a "compromise" plan based on the new 1990 census figures. The Court must now make its findings with respect to what was the primary force in the creation of District 3. Plaintiffs contend that race was predominant; however, the Court finds that while it was a factor, it is clear that political incumbency drove the pencil in designing these districts. Other factors that were at work were (1) the need to maintain a one-person/onevote ratio in the overall make-up of these districts, (2) the geographic realities of this parish, including considerations with respect to contiguity and compactness, and (3) other traditional districting principles. All were significant factors in the configuration of District 3 and far surpassed any racial concerns in the design of District 3. Indeed, the Court finds that the shape of District 3 was far greater a function of the "shape" of District

2 where James Lawson ("Lawson"), the "incumbent" from the 4-2-1 District 2, intended to run and win against his opponent Lloyd Giardina. Furthermore, District 3 has proven to unite valid communities of interest. The plan which is the subject of this lawsuit was the brainchild of James Lawson. Hence, the Court will referred to it as the "Lawson Plan. "

Incumbency

While the first majority-minority plan based on the 1980 census figures was adopted by Jefferson Parish, it had no real political consequences since the next scheduled elections were to occur after the 1990 Census results were to be implemented. The politicians knew that the changes in population would result in a modification of the 6-1 Plan. Furthermore, the next elections would necessarily pit incumbents against one another with the removal of the "floterial" seats. Indeed, Lawson testified that he was not as concerned with the configurations of those districts in the initial March 1990 scheme for that precise reason.

Thus, when the 1990 census figures were produced, Lawson knew that his political future hinged on obtaining the "best possible" District 2 from an electorial standpoint. Lawson had represented District 2 under the 4-2-1 Plan. District 3 was to remain the majority-minority district, so Lawson set out to insure that his strongest political constituencies would be placed in District 2 and that his anticipated opponent Lloyd Giardina's strongholds would be placed in District 3.

As a result he purposefully intended to have Westwego, the Lafitte area, Harvey, Marrero and Avondale

in his bailiwick. With these goals in mind, certain areas of what had been a more "compact" district, were cut and spliced onto District 3. If an area was considered good political fodder for Lawson or if it was considered harmful to Giardina, that area was placed in District 2.

Thus, precincts were carved up and politically gerrymandered. Grand Isle and lower Lafitte had been in District 2. These areas were "pro-Giardina"; thus, Lawson recognized that it would be more favorable to move these areas out of District 2 into District 3. This area is in the southern portion of the Parish and is divided from the incorporated municipality of Jean Lafitte by canals and the Intracoastal Waterway. Thus, Lawson carved a "v" into that tail, the entirety of which previously had been in District 2 and protected as much of the Lafitte area[7] which he considered politically positive territory. This area remained in District 2. He jettisoned the rest into District 3; thus, Grand Isle and Barataria became part of District 3.

Race could not have motivated this division. Under the precinct-by-precinct population data for the challenged plan in Plaintiffs' Exhibit 5, the total 1990 Census black population of Precinct 247, the unincorporated area across the waterway form the town of Jean Lafitte, which Defendants' Exhibit 19 shows was allocated to District 3 rather than District 2, contains 170 persons, of whom only 14.7 % are black. Accordingly, the assignment of undivided precinct 247 to District 3 did not increase the level of black voting strength in resulting District 3.

With respect to Avondale, it would have been easier

[7] 1 L and 2L--precincts of the Village of Jean Lafitte, 248 and 246B all went into District 2 for this reason.

to have left this area in District 3 as the area was more African-American in population; however, Lawson insisted on moving part into District 2. As a result Precincts 157A and 157B were created. Precinct 157A was populated and went into District 2; Precinct 157B is basically unpopulated, and it went into District 3 to provide a land bridge to Grand Isle. (Testimony of Gandolfi).

Marrero, a perceived Lawson stronghold, was carved up, in particular Precinct 174A & 174B. Precinct 174B is by far the larger portion and it went into District 2. Precinct 174A became part of District 3.

Woodmere likewise was divided. Lawson for political reasons also sought to eschew that part of the Woodmere Subdivision whose residents he had angered by diverting funds earmarked for drainage relief in the form of a pumping station, but which funds were insufficient for that purpose, to another project. (Testimony of Lawson, Kenneth Hughes, Alan Gandolfi, and Ward). Furthermore, the division of Woodmere, with Precinct 195 in District 2 and Precinct 196 in District 3, cannot be explained by claiming race was the motivation. Neither precinct is majority black -Precinct 195 is 22.4% black and Precinct 196 is 27.7% black.

Other Plans Considered

At least two other plans were considered, both of which may have been more "compact" or "prettier. " The East Jefferson Coalition proposed their plan which had a majority-minority district with a BVAP of 55%. This plan ran in a more east-west direction which parallels the direction of the African-American population of Jefferson Parish.

Nonetheless, this plan totally eschewed all principles of incumbency and traditional geographic districts in Jefferson Parish making its viability dubious at best. Obviously, this plan had no support by the Parish Council and thus, as plans are to generally be the product of the legislature, its future was bleak. However, one outgrowth of this plan was the belief on the part of Lawson that his plan had to meet or beat" the BVAP of the majority-minority district of the.East Jefferson Coalition Plan. However, the testimony is unequivocal that this perception was only in Lawson's mind. DOJ never required this heightened BVAP. Thus, to the extent that the "meet or beat" goal existed, it was political in nature--Lawson wanted insurance that **his** plan would be adopted as it protected his position. This was not an instance of race as proxy.

The other plan was one propounded by Lloyd Giardina, the floterial incumbent, who had chosen to run in District 2 because Butch Ward was his ally and Ward was the incumbent in District 1. This plan likewise was "prettier" and the traditional non-"V'd" District 2 remained in tact[sic]. Woodmere remained in District 2 and Avondale was in District 3. He had wanted to include Terrytown and Maplewood in his version of District 2; however, one-person/one-vote concerns prevented him from doing so. His plan was politically dead in the water. Lawson had outmaneuvered Giardina. Giardina could not even get a second for his plan. Lawson had previously obtained the votes of the other council members based on their belief that the Lawson plan preserved a politically ideal situation--their re-election. Furthermore, as to Lawson's opinion of the Giardina Plan, he admitted that it was unacceptable because it took away Lawson's voting strength and added voters to District 2 that were not familiar with him.

One-Person/One-Vote Considerations

The testimony was overwhelming that one-person/one-vote considerations were paramount in configuring these districts. (Testimony of Gandolfi, Lawson, Duker, Gelfand and Creed). Considering that Jefferson Parish had been taken to task in prior suits for its failure to abide by this principle, the council members were intimately aware of the need to spread population evenly. Alan Gandolfi, who is an attorney and was a research analyst for Jefferson Parish at the relevant time, testified that indeed this factor was his primary concern in doing his job with respect to the creation of a districting plan. For Gandolfi, with respect to tailoring the plan, one-person/one-vote considerations were followed by the need to remedy the § 2 violation and finally political wishes. With the 1990 Census results, District 3 had lost and District 1 and 2 had gained population. As District 2 was contiguous to District 3, geographically and for the sake of compactness, population needed to be moved into District 3.

Furthermore, the division of the Maplewood Subdivision was the result in part of these concerns. Maplewood had been initially placed wholly in District 3; however, Ida Saik had raised political Cain because she did not want to be taken out of Butch Ward's district, District 1. While community of interest concerns would militate against dividing a subdivision, it was imperative that for purposes of one-person/one-vote, the entirety of the subdivision not be put in District 1; hence, the split with Precincts 213A &C staying in District 3 and Precinct 213B being placed in District 1.

Also, the "zig-zagging" around the Harvey Canal was also necessitated by the oneperson/one vote dictate. It

was because of this concern that District 3 crossed over the Harvey Canal. (Testimony of Duker).

Geographic Considerations, Including Compactness and Contiguity

Historically, Jefferson Parish districts ran in a north-south direction. Considering that the parish is tongue-shaped, this fact is not surprising. However, the African-American population runs more in an east-west direction. Thus, in trying to form a majority-minority district these two realities had to be reconciled. Those persons involved in the actual drafting of the plan, Gandolfi, Hughes and Duker, all testified that compactness and contiguity were thus concerns.

Because of the need for contiguity particularly in light of the need to include certain more north-eastem population centers in District 3, precincts were divided to provide land bridges. One, which was previously discussed, was Avondale with respect to Precincts 157A and 157B. As noted, however, 157B is uninhabited, so splitting it off did not effect[sic] a community of interest. Harvey and Marrero were similarly split for bridging purposes and the Lafitte area as well.

Another factor that makes a more "perfect" configuration difficult is that there are vast tracts of uninhabited areas which make the districts more irregular in shape. (Testimony of Creed). Furthermore, dividing the district into 6 rather than 4 creates more margin for irregularity. Thus, taking into account all of these factors, the instant plan is sufficiently compact.

Other Traditional Districting Considerations

Jefferson Parish was not unaccustomed to splitting districts in order to achieve political goals. Indeed, as previously noted, most "splits" are supportable with viable reasons. Furthermore, as the precincts which were being split were somewhat new resulting from the mandate of the state legislature, the communities of interest were not as rigid within the precinct. (Testimony of Duker, Plaintiff's Exh. 15, Exh. G, D0117). Thus, it was not unusual, or contrary to Jefferson Parish's traditional districting considerations to split precincts even though this might not be the general norm.

David Creed also testified and the Court finds that no actual "stacking" occurred. "Stacking" is where more than 90% of one race is included or less than 10% of one race is left out of a district. Stacking is generally considered acceptable in the districting context. Had Jefferson Parish intended to stack, it could have included Shrewsbury and McDonoughville which it did not. Thus, the evidence does not prove that race predominated.

Communities of Interest

Plaintiffs maintain that there is little evidence that communities of interest were actually considered as such in the shaping of the subject district. However, this position ignores the fact that the Jefferson Parish Council which drafted the subject plan were defendants in the East Jefferson Coalition case during which evidence concerning the socio-economic conditions of the Parish's neighborhoods and subdivisions was produced. Obviously then, the Parish council was not oblivious to these facts.

Furthermore, it is evident to this Court that District 3 for the most part does share communities of interest. To begin, the historical background provided by Wilma Irving Laurence Powell, and Eugene Fitchue prove that the African-American communities located both on the East Bank and the West Bank of Jefferson Parish has been united in their efforts to improve schools, fire protection, sewerage, drainage and to obtain paved streets and sidewalks for their neighborhoods. The creation of the majority minority District 3 has created a legitimate opportunity to respond to neighborhood concerns and be more successful in achieving these goals.

Arleta Terrel's testimony further confirmed that a community of interest exists because of the economic similarity of the African-American community in District 3. The black residents of Jefferson Parish are a socioeconomically distinct community in that, as a group, they are dramatically lower in income, less educated, and more poorly housed than their white counterparts. District 3 does bring together a community of interest among black residents of the Parish that manifestly belonged in a single district, and had long been fragmented among council districts to the detriment of present District 3's residents.

One could argue that the splitting of the Maplewood subdivision would indicate that communities of interest were ignored. However, the reality is that (1) Ida Saik caused the division and (2) the Court heard precious little testimony of any real harm arising out of this division.

Another community of interest that plaintiffs claim was the townspeople of Lafitte assigned to District 2 and the others in the unincorporated area beneath it in District 3. The

Court heard ample credible testimony that the communities of interest were not trampled because these two areas did not actually contain one cohesive group as evidenced by the fact that the lower area chose not to become part of Village of Jean Lafitte.

Finally, the Court finds that by virtue of the geographic realities of the Parish and the history of its development, the Parish itself is made of extremely different communities of interest. This Parish has as residents some of the most wealthy individuals in this state as well as some of the most poor. It contains both urban and rural societies. It houses bustling industrial and retail centers as well as fishing communities. Considering these realities, District 3 as constituted has united, as closely as possible, interests that are related.

Wildgen Testimony and the Use of the Geodistricting Software

The Court finds that the use of the Geodistricting Software did not predominate in the formulation of District 3. While it is beyond cavil that race was a consideration, it did not drive the Lawson Plan. John Wildgen testified otherwise; however, the Court found his testimony to be unavailing.

Wildgen designated 5 areas that he claims were "black" areas used solely to increase the "blackness" of District 3. With respect to the Kenner precincts 13K-b, 21K and 22K, the Court does not find this projection so irregular. Furthermore, the community of interest at work supports its inclusion in District 3. Furthermore, with respect to Precinct 13K-b, Wilma Irvin testified that this division is consistent

with the split Kenner district lines. With respect to the Avondale Precincts 156 and 157B, 157B was divided for a land bridge and contains no people. Concerning the Marerro Precincts 173, 180 and 181, the Court believes the evidence demonstrated that these were moved because of one-person/one-vote concerns. Likewise, certainly the Maplewood division was explained adequately for one-person/one vote concerns, along with the Ida Saik' uproar. Finally, with respect to Precincts 104 and 33K , these areas certainly share the community of interests such that they should be included in District 3.

Likewise, the Court found less than persuasive the testimony of Robert DeViney who was involved in the redistricting process. He testified that the configuration of District 3 was a racial gerrymander. He testified that he disagreed with the entire process arising out of the Voting Rights Act alegations making in this context his opinion suspect. Other like opinions (i.e. District 3 was a racial gerrymander), were demonstrated to be without foundation in fact through the evidence adduced at trial.

Retrogression

Because of the increase in black population in District 3 under the findings of the 1990 Census, Jefferson Parish was justified in using 52.3% BVAP as the benchmark for to determine retrogression under Section 5. The Court recognizes that Lawson overshot this number by almost 5% points. However, as explained in detail above, the motivation here truly was political not racial. Plaintiffs did not prove in their case that there was the kind of coercion and intent to "maximize" black population within District 3 by DOJ that was critized in *Miller v. Johnson,* 115 S. Ct. 2475

(1995). Here, it was not DOJ, but Lawson's albeit misguided appreciation of the situation which resulted in this jump.

Vestiges of Discrimination

The record of the *East Jefferson Coalition* case, many of the uncontested facts contained in the Pre-Trial Order and the testimony received at trial lead to the ineluctable conclusion that there remains vestiges of discrimination in Jefferson Parish. The court finds based on the testimony of Irvin, Cassimere and Powell that there are vestiges of discrimination. In particular the evidence with respect to the resolution to isolate the predominantly white portion of Maplewood from the predominantly black by use of a barricade is compelling. Another incident has to do with the stop orders issued by Sherrif Lee concerning stopping black individuals in predominantly white neighborhoods. While discrimination is certainly not on the scale of what it was in the 1950's, race neutrality has not been achieved in Jefferson Parish at this time.

Plaintiffs' Contentions

As noted, plaintiffs contend that District 3 is the product of an racial gerrymander and seek the redistricting of the Jefferson Parish Council on "a basis not predominantly motivated by racial considerations" relying on *Shaw v. Reno,* 113 S. Ct. 2816 ("*Shaw I*") and *Miller v. Johnson*, 115 S. Ct. 2475 (1995). Plaintiffs argue that race was the predominant factor in the configuration of District 3 and as such must be subject to "strict scrutiny." They further maintain that strict scrutiny will demonstrate that the district was not "narrowly tailored" and thus is unconstitutional in its present configuration. As a basis for this position, plaintiffs rely on

the odd shape of the district and the context in which District 3 had its genesis. Plaintiffs bear the burden of proof in these respects, and this Court finds that plaintiffs failed in this endeavor.

CONCLUSIONS OF LAW

The Applicable Law

In *Miller*, the Supreme Court grappled with the constitutionality of Georgia's Eleventh Congressional District which had been configured in response to the Justice Department's refusal to preclear earlier reapportionment plans pursuant to § 5 of the 1965 Voting Rights Act. As the Fifth Circuit noted in *Clark v. Calhoun County, Mississippi*, 88 F.3d 1393 (5th Cir. 1996), discussing plaintiff's burden of proof as set forth in *Miller:*

> The Court encountered greater difficulty, however, in affirmatively defining the plaintiff's burden of proof. The Court acknowledged that legislatures will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. [*Miller*, 115 S. Ct. at 2488]. Distinguishing between permissible awareness and impermissible motivation "may be difficult" and will require courts "to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. " *Id.* Nevertheless, the Court attempted a definition:
>
> > The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to

> legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Id. Justice O'Connor added in her concurring opinion that this standard was "a demanding one, " requiring the plaintiff to show that the legislature "has relied on race in substantial disregard of customary and traditional districting practices. " *Id.* at _, 115 S. Ct. at 2497 (O'Connor, J., concurring). In those cases where the plaintiff successfully proves that race was the "predominant, overriding" consideration motivating the drawing of district lines, the burden shifts to the defendant to demonstrate that its districting plan is narrowly tailored to achieve a compelling governmental interest. *Id.* at _ , 115 S. Ct. at 2490.

Id. at 1402-03. If a district is "narrowly tailored" it survives "strict scrutiny" and is not unconstitutional.

The Supreme Court explained in *Bush v. Vera*, 116 S. Ct. 1941 (1995):

> Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subject political gerrymandering to strict scrutiny. . . . And we have recognized

> incumbency protection, at least in the limited form of "avoiding contests between incumbent[s], " as a legitimate state goal....

Id. at 1954 (citations omitted).

Thus, this Court must find that Jefferson Parish ignored, inter alia, compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest, as well as the overriding necessity of creating districts true to the principles of one-person/one-vote, to racial considerations in order to decide whether an Equal Protection Claim has been raised. Then, if race predominates, the Court must assess whether Jefferson Parish can satisfy strict scrutiny.

If it so finds, Jefferson Parish would then be required to demonstrate that its districting legislation is (1) narrowly tailored (2) to achieve a compelling state interest. *Miller*, 114 S. Ct. at 2490.

Does District 3 Require Strict Scrutiny?

The Court finds that plaintiffs failed to carry their burden of proof with respect to proving that racial considerations predominated in the configuration of District 3 that is the subject of this litigation. While race, through the force of § 2 of the Voting Rights Act, provided the genesis for the majority minority district, it did not dictate the eventual boundaries of District 3. An analysis of the evidence adduced supports this finding.

Shape of the District

While plaintiffs have consistently opined that the

shape of this district is so bizarre on its face as to be inexplicable on grounds other than race, this Court disagrees completely. Even at first glance, this Court does not believe that the shape is so horrific so as to demonstrate circumstantially that race motivated the form of the district. District 3 is neither a "Rorschach ink-blot test" nor a "bug splattered on a windshield. " It does not wind in a serpentine fashion; it does not resemble "a sacred Mayan bird. " This district does not have those visual indices that are so allegedly obvious in *Hayes, Miller* and *Shaw*. There are not the kind of narrow land bridges that conflict with the Eleventh Amendment and were condemned in *Miller.* Most, if not all of those "bridges" are uninhabited, geographical necessities in District 3.

The Court recognizes that in the past, District 2 was comprised of the entire "peninsula" that is Jefferson Parish's wetlands tail. All of Lafitte and Barataria were included. Thus, to the extent that the length of the district creates "irregularity", that is necessitated by the Parish's shape. Nonetheless, the Lafitte split was proved to be anchored in political necessity and the Lawson/Giardina fight for a district. Furthermore, the geographic concerns outlined earlier also explain the peculiar shape. Grand Isle is 20 miles away from the nearest land mass in the northsouth axis of this district. In relation to the breadth of the east-west axis, there are also immense unpopulated areas included that make this area vast. Moreover, these areas have a substantially predominate white population.

This Court stands convinced that the changes that occurred to create District 2 and District 3 as they are now configured were driven primarily by politics. The second force was the concern centered around one-person/one-vote. Race was a concern, but it did not predominate. For exam-

ple, Lawson's decision to reach in and take Avondale into District 2 for political reasons, required substituting other populations for that which was stripped out of pre-1990 Census District 3. Politics also drove part of Woodmere into District 3. The Court will not reiterate its previous findings of fact. However, the Court firmly believes that those findings support the conclusion that strict scrutiny has no place in this inquiry.

This is not an instance where the councilmen used race as proxy. They were intimately aware of the various voting habits of their various constituents. They did make partisan political decisions in which race was used as a means to identify potential constituent support. All council members did testify as to their familiarity with the constituent neighborhoods in and surrounding District 3 and where applicable the degree to which these areas had supported their respective candidacies in the past. This fact is most evident in the testimony of both Lawson and Giardina.

Nonretroactive Application of Shaw I and Its Progeny

As previously noted, the plan at issue herein was specifically approved by the Fifth Circuit, and the Parish was thereby ordered to submit that plan to the United States Attorney General for expedited review under Section 5. *East Jefferson Coalition v. Parish of Jefferson*, C.A. No. 91-3511 and No. 91-3655, slip op., (5th Cir. August 8, 1991) (unpublished). The parties have not cited to the court any reapportionment case where any court, applying *Shaw I* and its progeny, has overturned a districting scheme adopted pursuant to a United States Appellate Court decision. Therefore, there is a question as to whether *Shaw I* and progeny should have a retroactive effect on the instant plan.

In *Jackson v. DeSoto Parish School Board*, 585 F.2d 526 (5th Cir., 1978), the late Alvin B. Rubin writing for the court, stated:

> American citizens have a constitutional right to participate fully and effectively in the election of county governmental authorities, . . . reapportionment plans, whether adopted by legislative enactment or court order, are not immutable. The judicial process must be flexible enough to allow changes to schemes that have, because of changing population patterns and the developing body of constitutional jurisprudence, become unconstitutional in their operation.
>
> [While decennial a reapportionment as a rational method], ... this does not mean that a political body cannot be compelled to reapportion itself more than once every ten years.
>
> A challenge to the constitutionality of a court - or a reapportionment plan - is not precluded by principles of res judicata or federal estoppel. It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions . . .
>
> Such inequity becomes particularly intolerable when, as here, constitutional rights are involved. This court has thus been unwilling to bar subsequent challenges to reapportionment schemes, seemingly constitutional when institute by the

> court, but apparently adequate under the rapidly changing jurisprudence in this area . . . .

Id. at 728-29.

Defendants acknowledge that their challenge to the constitutionality of a court ordered reapportionment plan is not precluded by principles of res judicata or collateral estoppel. However, the defendants do contend that this Court should exercise its discretion to decline remedial action in the application of recent constitutional jurisprudence because of the manifest injustice to the Jefferson Parish defendants. Defendants contend that this discretion is granted by the holding of *Chevron Oil Company v. Huson,* 404 U.S. 97, 92 S. Ct.349, 30 L.Ed.2d 296 (1971). The Supreme Court outlined the relevant three factors to considered with regard to the nonretroactive application as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, ... Second, it has been stressed that 'we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation ". . . . Finally we have weighed the inequity imposed by retroactive application, for " [where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the

'injustice or hardship by a holding of nonretroactivity."

Chevron, 92 S. Ct. at 355 (citations omitted).

In the event of retroactive application of the costruction of the Equal Protection Clause and the Voting Rights Act in *Shaw I* and its progeny were applied here, defendants urged that it would produce substantial and inequitable results. Jefferson Parish would allegedly be exposed to the penalty and burden of redistricting, in addition to the possible taxing of attorney's fees and costs of the plaintiffs against it as a "remedy" for its previous compliance with a remedy ordered by this very court in the *East Jefferson Coalition* case.

Since this Court has held that strict scrutiny does not apply in this case, and therefore, there has been no constitutional violation, no harm has resulted in re-evaluating the situation in light of *Shaw I* and its progeny. Thus, there being no "injustice" as defined by defendants resulting, there is no reason under the circumstances of this case not to apply the new case law. The Court recognizes that to a degree, this decision may be putting the cart before the horse and that in other circumstances a court may be faced with such a request early on in the litigation to forestall the application of a new principle of law. However, in the case at bar, this request was raised at the eleventh hour. As such, the equities dictated that the Court not exercise its discretion in this manner.

CONCLUSION

In sum the shape of District 3 is certainly not a paradigm of compactness. However, it is not bizarre in com-

parison to districts which have been stricken by other courts. More importantly, most of its "aberrant" aspects were caused not by race but by the following: (1) political incumbency concerns, particularly those of James Lawson, (2) the unique configuration of the Parish; (3) the unique topography of the Parish as it is at least 50% marsh and water, (4) one-person/one-vote considerations, (5) vocal political activism such as that demonstrated by Mrs. Ida Saik, and (6) Grand Isle's being 20 miles away from any other inhabited area of the Parish. Thus, all of these factors, as well as those others mentioned above like community of interests, were considered by the Jefferson Parish Council while it was also conscious of race. As such, the Court is convinced that "in the context of redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required. " *DeWitt* , 856 F. Supp. at 1415. Furthermore, even if it were required, this plan has been narrowly tailored to meet a compelling state interest.

Accordingly,

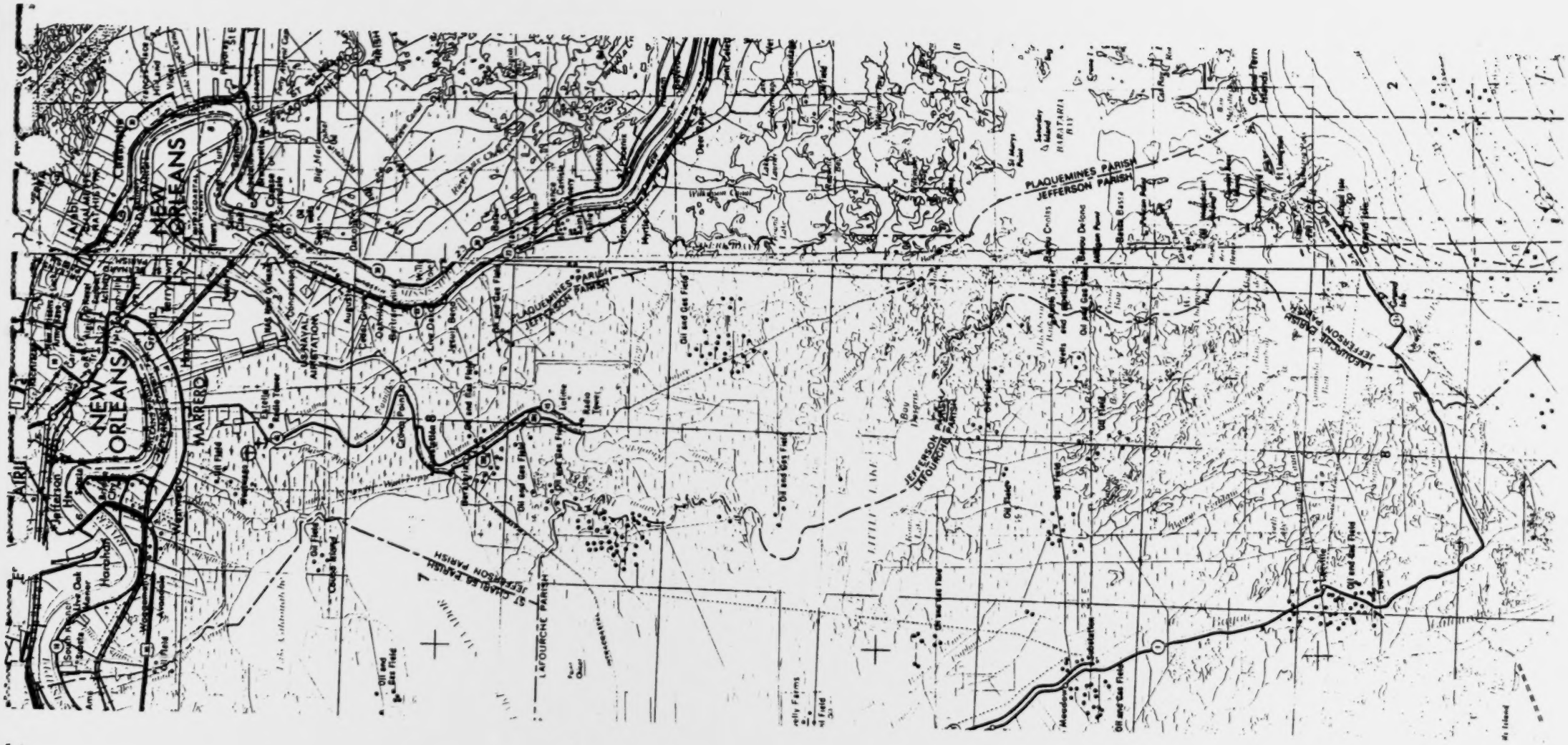
IT IS ORDERED that judgment be entered in favor of the Parish of Jefferson, Tim Coulon, in his official capacity as President of the Parish of Jefferson; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T.J. "Butch" Ward, Lloyd F. Giardina, Donald R. Jones, Edmund J. Muniz, John Lavarine, and Nicholas Giambelluca, Sr. as current members of the Jefferson Parish Council, who have been sued by plaintiffs in their official capacities; intervenor, the Civil Rights Division of the Department of Justice; Council of the City of Kenner ("Kenner") and against plaintiffs Dennis Theriot, Ann Rodriquez, Ronald Perrin, Norman A. Ronquille, David J.

Dowell, Iris C. Isenmann, Herman J. Carbo and the Maplewood Civic Association, Inc., dismissing plaintiffs' complaint, with each party to bear his, her or its respective costs.

New Orleans, Louisiana, this 24th day of April, 1997.

/S/ Stanwood R. Duval, Jr.

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT
JUDGE



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